

## **Attachment B**

[SEALED]

1                                   IN THE UNITED STATES DISTRICT COURT  
2                                   IN AND FOR THE DISTRICT OF DELAWARE  
3                                   - - -  
4           XCOAL ENERGY & RESOURCES,                                   : CIVIL ACTION  
5                                   Plaintiff,                                   :  
6           v   :  
7           BLUESTONE ENERGY SALES CORPORATION,                       :  
          SOUTHERN COAL CORPORATION, and                               :  
8           JAMES G. JUSTICE, II,   : NO. 18-819-LPS  
                                 Defendants.                               :  
                                 - - -

9   Wilmington, Delaware  
10    Wednesday, August 26, 2020  
11    *Bench Trial - Volume B*  
12    - - -

13           BEFORE:                                   HONORABLE LEONARD P. STARK, Chief Judge  
14    - - -

15           APPEARANCES:

16                                   BUCHANAN INGERSOLL & ROONEY, PC  
17                                   BY: GEOFFREY G. GRIVNER, ESQ.

18    and

19                                   BUCHANAN INGERSOLL & ROONEY, PC  
20                                   BY: KEVIN P. LUCAS, ESQ., and  
                                  DANIEL C. GARFINKEL, ESQ.  
                                  (Pittsburgh, Pennsylvania)

21    Counsel for Plaintiff

22                                   Valerie J. Gunning                                   Brian P. Gaffigan  
23                                   Official Court Reporter                           Official Court Reporter  
24  
25

APPEARANCES: (Continued)

POTTER ANDERSON & CORROON, LLP  
BY: JOHN A. SENSING, ESQ.

and

THE GETTY LAW GROUP, PLLC  
BY: RICHARD A. GETTY, ESQ., and  
DANIELLE HARLAN, ESQ.  
(Lexington, Kentucky)

and

McGUIRE WOODS, LLP  
BY: GEORGE TERWILLIGER, ESQ.  
(Washington, District of Columbia)

Counsel for Defendants

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PROCEEDINGS

(REPORTER'S NOTE: Side bar conference. The following portion ordered sealed by the Court, contained herein.)

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MR. SENSING: Marco, I'm not sure if everybody is getting a message saying that the breakout room will close in 30 seconds.

No?

MR. LUCAS: Yes, I am.

MS. HARLAN: I got the same message.

MR. GARFINKEL: This is Dan. I have the same message as well.

MR. SENSING: I don't think Marco is here to save us either.

MS. HARLAN: Kevin is in the courtroom speaking with Marco right now.

(Virtual sidebar conference ends.)

\* \* \*

(Virtual sidebar conference.)

THE COURT: Okay. My screen says I'm now in a breakout room. And I can see Mr. Getty and Mr. Lucas. And here comes Marco.

Are the folks who are supposed to be in the sidebar and only those folks in there?

Marco, can you confirm that?

MR. HEIM: Correct. I confirm that.

THE COURT: Okay. And Brian, good morning. You are there; right?

THE COURT REPORTER: Good morning, Your Honor.

Yes, I'm there.

THE COURT: Good morning, Brian. Okay.

Is Mr. Sensing in? Mr. Sensing?

MR. HEIM: He is still joining.

Here he comes.

THE COURT: Marco, are we still waiting for Mr. Sensing?

Marco?

I'm guessing that Marco stepped out to go find

Mr. Sensing because I don't see either of them listed here so we'll wait.

MS. HARLAN: John has advised Rich on a cellphone call that he is having technical issues, but he's trying to resolve them.

THE COURT: Thank you for that. We'll give them a few moments.

MR. TERWILLIGER: Judge, while we're waiting -- this is George Terwilliger. I just wanted to thank you for allowing me to appear on very short notice on this matter. I appreciate it.

THE COURT: Good morning and welcome. And I'm glad your computer seems to be working just fine.

MR. TERWILLIGER: Thank you. Thank you, Judge.

MR. SENSING: Good morning, Your Honor. This is John Sensing. I understand that -- I got kicked out of the

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breakout room, and I think folks may have been waiting for me to get back so I wanted to let you know I'm back.

THE COURT: We were, and I'm glad that you are back. And so I now think everyone who needs to be here and only everyone who needs to be here is here.

So with that, Mr. Lucas, you may proceed.

MR. LUCAS: Your Honor, thank you. Thank you very much.

If I could indicate, address upfront, again, before I get into substance, comments made this morning concerning the letter of last evening.

And I will tell you, and I'm sure we will hear it again, I have been accused this morning of sharp practice in fairly vocal terms, and I'm fully prepared to address any of the questions or the issues that the other counsel or the Court has.

Your Honor, you also mentioned in your opening comments that the letter last night says that the plaintiff joins in the request as opposed to does not oppose.

That is, in fact, true. In fact, I changed it from does not oppose to join because in a recent similar situation, we filed a do not oppose, and you had us re-file something that said that is not a position.

So I'm doing the best -- believe me, I'm doing the best I can in a difficult situation, and it's not my

1 intention to get a leg up on anyone here.

2 What happened was last night we were working --  
3 the reason why you got the letter, I guess, at 8:53, is  
4 that counsel were in discussions back and forth on these  
5 circumstances. And I was trying to further assess going  
6 into those calls, you know, what my position and situation  
7 really is.

8 And so the end result I put in the letter last  
9 night, and counsel agreed to put in the letter, with great  
10 reluctance the plaintiff joins in the defendants' request,  
11 which request raises ethical issues of counsel with respect  
12 to nonparty witnesses that will require additional time to  
13 address.

14 And I realize that is cryptic. And I thought  
15 you might, you know, be scratching your head what exactly  
16 am I saying. Because I'm trying to be careful here, Your  
17 Honor. These are nonparties that are involved, the  
18 allegations are serious. The source of the allegations  
19 are highly suspect and unauthenticated. And as I said,  
20 I'm trying to balance a number of considerations here.

21 I'm going to be calling witnesses. As you  
22 mentioned yesterday, the next two witnesses are two  
23 people -- I mean, after Mr. Thrasher, if the trial goes  
24 forward at this time, that are named in the letter of  
25 yesterday. They're nonparties. And also the other two

1 transcript, including some comments that Your Honor had  
2 made, and I will tell you, I came away with the impression  
3 that, at least my view going in, is that the Court would  
4 not necessarily follow whatever the parties might suggest.  
5 The Court might have other alternatives. I think you had  
6 suggested yesterday some options that, you know, you thought  
7 people might make, there might be other options.

8 And so I thought more about that. And,  
9 frankly, one of the things I focused on was in light of  
10 my considerations, that this is a nonjury trial; and,  
11 therefore, the Court has a lot of -- more control over  
12 sequencing and conducting a trial than we would if this  
13 was a jury trial, a lot more practical capabilities.

14 So my thought was this, Your Honor, in, you  
15 know, in a big sense, is that was perhaps for consideration  
16 hold the motion to adjourn in abeyance, just hold it in  
17 abeyance, and you can decide it whenever, whenever you think  
18 it appropriate in the next several days presumably, but hold  
19 it in abeyance.

20 That would be No. 1.

21 In yesterday's conference, you had laid out on  
22 page 82 one potential option. I call it the Option No. 1  
23 just because it came first on page 82, but this idea is,  
24 well, maybe we go forward and just without the letter. The  
25 letter is not in the record, just go forward as if it never

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1 parties are companies that are named in the letter could  
2 become witnesses or rebuttal witnesses down the road. SGS  
3 was already named on our witness list, and I had told  
4 Mr. Getty when he and I discussed and exchanged who each  
5 side was likely to call, you know, as opposed to who they  
6 listed as potential witnesses that we may very well call  
7 them in rebuttal.

8 So, No. 1, I just want the Court to realize and  
9 opposing counsel to realize that at least from my point of  
10 view, I'm trying to deal with a difficult situation as best  
11 I'm able. And the problem here with the nonparty witnesses,  
12 Your Honor, is I don't represent these people. I can't  
13 advise them. I'm operating under a sequestration order  
14 which I'm trying to be extremely careful about.

15 And so I'm not really in a position at this  
16 point, or at least haven't felt to be in a position, to be  
17 able to address these matters with those witnesses, and  
18 perhaps they would want counsel of their own separate, as I  
19 said, I'm not their counsel and that type of thing.

20 And so these issues are real. That is what I  
21 was attempting to address and at least to alert the Court.

22 I want back last night, I got some sleep, not a  
23 good night, but I got some sleep last night, and I had a  
24 chance to think a little bit more about what we talked about  
25 yesterday. I had a chance to look over portions of the

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1 happened, and we'll have the trial that way.

2 So that was an option. Clearly you weren't  
3 saying that was what you were going to do, but that was an  
4 option.

5 And so I thought, thinking about this, in those  
6 circumstances and the concern about third-party witnesses  
7 and the Court's comments about wanting to, you know --  
8 having prepared for the trial and wanting to make good use  
9 of the time set aside, would it be something that the Court  
10 would want to consider, and maybe all parties consider, both  
11 the Court would want to consider, holding the motion to adjourn  
12 in abeyance and going forward with the case as indicated but  
13 with the nonparties not testifying at this time.

14 So with the parties testifying, going forward  
15 with the testimony, if the Court feels that is an option  
16 that the Court would prefer, or if that just is the option  
17 that makes most sense at this point. That would give us the  
18 time and the ability, Your Honor, No. 1, for all of us to go  
19 forward and have more information when the time -- you know,  
20 a decision is made.

21 In the meantime, we can consider what needs  
22 to be done. "We," I mean everyone in terms of the  
23 sequestration order as well, in terms of advising the  
24 nonparties of what has happened.

25 I mean, I'm in the situation, Your Honor, that

1 if the trial goes forward today, for example, Mr. -- you  
 2 know, my client, Mr. Thrasher, is a party and so I represent  
 3 him. I feel we can make decisions, informed decisions on  
 4 his behalf, or he can make them represented by counsel. But  
 5 Mr. Taylor, you know, Mr. Payne, and then possibly SGS or  
 6 Standard Labs, to the extent that they would become now  
 7 relevant or want to be called, these would all be people we  
 8 don't represent.

9 And so I would need to know, I would think, that I  
 10 can disclose to these people what they need to know so they  
 11 can make an informed decision as to whether or not to testify.

12 My big concern, Your Honor, just my big concern  
 13 was if you decided to go forward, if you decided on whatever  
 14 basis you wanted to go forward with testimony, if I have to  
 15 go forward with calling or not calling a nonparty witness in  
 16 this case, it is a very, very uncomfortable position.

17 And I hope Your Honor shares my view. I mean,  
 18 I'm not a criminal lawyer, my background and whatnot, it's  
 19 an issue where I would be calling these people as witnesses,  
 20 the extent to which I can make disclosures to them is  
 21 uncertain at this point, particularly with the sequestration  
 22 order.

23 They're not aware of, at least from me, this  
 24 letter at this point in time, and they may want to, you  
 25 know, make some decisions or consult counsel of their own

1 agreeable to. I mean, you may, you may not. But it's not  
 2 something that I thought that, you know, that was -- it was  
 3 a done deal if that were the case.

4 So it's not my intention. If there is some  
 5 potential prejudice to any of the plaintiff's counsel in  
 6 terms of the testimony going forward today and they were  
 7 somehow anticipating it wouldn't go forward today, I'm  
 8 flexible, obviously. I mean, you know, if it goes forward  
 9 tomorrow or something if the Judge wants to -- Your Honor  
 10 wants to pursue this alternative.

11 I mean, it's not my intention to snooker anyone.  
 12 Please accept that representation.

13 And the other thing that we talked about last  
 14 night, and it's in the letter, I'm fully in favor of -- in  
 15 fact, you know, we had raised the issue -- about forensic  
 16 preservation with respect to the letter in question.

17 I mean, so that's really the background, Your  
 18 Honor, but I thought that I needed to raise this to you  
 19 first because if you came back to me later and said, well,  
 20 wait a minute, after you decided how you were going to rule  
 21 and ask me why I didn't tell you sooner, and obviously  
 22 particularly in light of the incident kind of we had  
 23 yesterday, I wanted to make sure plaintiff's counsel were  
 24 aware of what I had thought, and, you know -- I mean, I  
 25 talked to the client this morning, very early, at 7:15 or

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1 choosing to make that decision.

2 So that was the reason, that was the reasoning  
 3 on which, when last evening when we talked with defendants'  
 4 counsel, that we decided to join in the motion, you know,  
 5 with reluctance. But it was that -- and that's what my  
 6 language is intended to reflect and kind of alert you to  
 7 these nonparty considerations.

8 But what I -- like I said, what I was most  
 9 concerned about when I thought about it overnight is that  
 10 if Your Honor decided, well, I hear the parties' position  
 11 but I want to go forward, I'm in an impossible position,  
 12 Your Honor, as far as I'm concerned, and an unfair position  
 13 to these nonparties to be in a position to call them as  
 14 witnesses, you know. Or for me to even talk to them further  
 15 about these matters, just to call them as a witness period,  
 16 but they're an uninformed, unrepresented witness, to make a  
 17 determination as to whether or not they want to -- whether  
 18 they want to testify under these circumstances.

19 And so that's it. It's not intended, Your  
 20 Honor. Believe me, it's not intended to be sharp practice.

21 I could understand, you know, why counsel would  
 22 say, I thought we had a deal last night. As I said to them  
 23 last night and I repeated to them this morning, at least  
 24 it was my understanding yesterday that even if we had a  
 25 deal, it doesn't mean it was a deal that Your Honor would be

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1 thereabouts. I tried to set up a conference call for 8:00  
 2 o'clock. Obviously they weren't expecting it so we had the  
 3 call a little bit later.

4 I told them what this proposal was going to be,  
 5 so they would have the opportunity. So like I said, I put  
 6 that out for the Court's consideration, and obviously I'm  
 7 more than happy to answer any questions that the Court might  
 8 have.

9 Thank you, Your Honor.

10 THE COURT: Thank you. I do have a few before  
 11 we turn it over to defendants.

12 The ethical issues referred to in the letter and  
 13 then again this morning, you don't have any ethical issues  
 14 with respect to your client, that is you are fully prepared  
 15 to proceed with respect to the party witnesses and, in  
 16 particular, your own client. Is that correct?

17 MR. LUCAS: I would like -- yes. Under the  
 18 option, what I called the number one option, the Court would  
 19 always have the ability to have Mr. Thrasher come back in  
 20 and testify at a later time, but, yes, if we're going to go  
 21 forward as if we were going to go forward the day before  
 22 yesterday, then, you know, Mr. Thrasher can make and Xcoal  
 23 can make that determination, and we represent Xcoal. So,  
 24 yes, I feel comfortable we can make that informed  
 25 determination, or he can make that decision on an informed

1 basis.

2 THE COURT: I would not have thought that the  
3 sequestration order precluded anyone from providing this  
4 letter to witnesses, to non-party witnesses. I would have  
5 thought the sequestration order, you know, limited access to  
6 the trial proceeding. Whether or not that is what the order  
7 would literally say at this point, do you have any objection  
8 to me making it clear that this letter can be shared with  
9 all witnesses, including non-parties, and then they can make  
10 their own determinations as to whether they need to retain  
11 counsel or not?

12 MR. LUCAS: No, Your Honor. I mean, if I  
13 overly, overly read the extent of the sequestration order  
14 under the circumstances, I tried to proceed in a precautionous  
15 manner, but certainly, I do not have a problem that these  
16 witnesses could be made aware of the letter and then they  
17 have a period of time and they're going to have to at least  
18 decide whether they want to, you know, retain counsel and  
19 get separate opinions.

20 So that, it seems to me, the trial for this  
21 week, at least in my mind would have to be, would have to be  
22 postponed or adjourned, but, like I said, no. If the Court  
23 tells me that I have to, makes clear that I have the  
24 ability to do that, then I have no objection, Your Honor.  
25 The letter is there. It has been filed with the Court.

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1 Mr. Getty had indicated he thinks that he may have some  
2 obligations to submit it to, you know, authorities. I think  
3 those are all relevant matters that any kind of non-party  
4 witness would want to know about. So I would welcome that  
5 kind of clarification.

6 THE COURT: And does Mr. Thrasher know of the  
7 letter and is he prepared to testify as early as today?

8 MR. LUCAS: Mr. Thrasher is aware of the letter.  
9 He is prepared to testify earlier today under the number one  
10 option, Your Honor. Again, if there's something different.  
11 But his option that that letter is not going to be part of  
12 the examination, cross-examination.

13 THE COURT: But he's not prepared, or at  
14 least it would not be your preference to go forward with  
15 Thrasher's testimony if I were to permit the letter to be  
16 used as part of that examination?

17 MR. LUCAS: I would say it's certainly not  
18 my preference, Your Honor. On the, on the other question,  
19 I would have to get clarification from Mr. Thrasher on  
20 that.

21 THE COURT: Okay. All right. Thank you.

22 Mr. Getty, tell me what you would like me to  
23 know and particularly how you'd like me to proceed.

24 MR. SENSING: This is John Sensing, Your Honor.  
25 Good morning. I was going to handle this argument for the

1 defendants if that's acceptable.

2 THE COURT: I did not mean to exclude you.

3 MR. SENSING: Not a problem at all, Your Honor.

4 So as Mr. Lucas said, as of last night at  
5 9:00 p.m., Your Honor, we had an agreement to adjourn  
6 this trial to engage in discovery on this letter and to  
7 really try to get to the bottom of what are some pretty  
8 explosive allegations in the letter. And as Mr. Lucas  
9 said, originally, he took no position on it and he joined  
10 in that request.

11 So our view is that that letter is, it's in  
12 agreement of the parties. I view the letter that I  
13 submitted last night at 8:53 as akin to a stipulation  
14 between the parties, which is binding on the parties,  
15 subject, of course, to Your Honor's approval.

16 So now we come in this morning and have a phone  
17 call with Mr. Lucas at about 8:30 where we have this new  
18 proposal, which is, to be candid, we viewed as a bait and  
19 switch, Your Honor. And, you know, the issue here, and what  
20 I think is going on, is, and I think Mr. Lucas answered Your  
21 Honor's question on this is he wants to avoid Mr. Thrasher  
22 having to have anything to do with that letter, and we think  
23 we should be able to use that letter with Mr. Thrasher's  
24 testimony. We think we need to have discovery on that  
25 letter prior to its use.

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1 And a lot of Mr. Lucas's argument was saying,  
2 and I agree with most of this where he says, look. There's  
3 a lot of non-party issues involved here, and I think he's  
4 exactly right, and I think those are all great reasons for  
5 the 45-day discovery adjournment that we proposed in the  
6 joint letter last night.

7 But I do want to correct Mr. Lucas to the  
8 extent where he was implying that only non-parties are  
9 implicated in that letter, because Mr. Thrasher absolutely  
10 is implicated in that letter. And it is our position that  
11 before Mr. Thrasher testifies, we need to have discovery  
12 on that. We need to be able to use that letter, and I  
13 understand at some point, we're probably going to have an  
14 evidentiary argument about that letter and what we can do  
15 with it.

16 But in our view, it is prejudicial to us for  
17 Mr. Thrasher to testify today whether or not we can use the  
18 letter because there has been no discovery vis-à-vis the  
19 letter with the third parties, with others. And that was  
20 what Xcoal agreed to last night and that's an agreement that  
21 we think Your Honor should enforce this morning.

22 THE COURT: All right. Mr. Sensing, what would  
23 be your position on a middle ground, where, you know, we  
24 adjourn essentially for today -- well, first answer this.

25 Any objection to the letter being shared with the non-party

1 witnesses?

2 MR. SENSING: No, I don't think I have an  
3 objection to that. I mean, I think in discovery, you know,  
4 I had envisioned in the discovery procedure, it was going to  
5 get shared with those non-parties at some point anyway, so,  
6 I mean, subject to working out the parameters of that, I'm  
7 sure we can. I don't have an issue.

8 THE COURT: So if I had a short adjournment  
9 and direct that somebody share that letter with their, you  
10 know, with all witnesses, you know, non-parties as well as  
11 parties, and that those witnesses somehow make known to you  
12 all fairly expeditiously whether they need time to retain  
13 counsel or whether they are comfortable going forward and  
14 testifying and, you know, we wait a day or two, something  
15 like that, and see if anybody has any concerns in addition  
16 to what has been expressed by the parties, and then I assess  
17 based on what that looks like whether I need a longer  
18 adjournment.

19 I recognize you have a request for discovery and  
20 you believe you have good cause for discovery and I need to  
21 make a decision on that, but is there anything else I'm not  
22 thinking of that would be the decision point, and/or what is  
23 your position on maybe I don't need to decide on your good  
24 cause showing for discovery in a lengthy adjournment. Maybe  
25 I need to take just an interim step and see if my trial is

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1 disrupted by, you know, witnesses now wanting to get advice  
2 of counsel before they show up and testify.

3 MR. SENSING: Well, I think -- certainly, I  
4 mean, if Your Honor goes that route, I think it certainly  
5 makes sense to, you know, so the witnesses aren't walking in  
6 and getting ambushed is a little bit strong, but I mean,  
7 certainly that makes sense.

8 But our position would be, I think that would be  
9 prejudicial though to my client because we have a situation  
10 where there are allegations in the letter that **test results**  
11 **have been falsified**, and that is, if true, that is something  
12 that is going to be extremely meaningful in the course of  
13 this trial, and I'm just using this as one example, Your  
14 Honor.

15 And this is something that we need to take  
16 discovery on before these folks testify. So I would  
17 respectfully oppose that suggestion, and I think, again, we  
18 think, my client thinks the agreement the parties reached  
19 last night to adjourn things for 45 or so days to take  
20 discovery on these issues, we think Your Honor should grant  
21 that.

22 THE COURT: All right. Anything else from your  
23 side, Mr. Sensing, at this point?

24 MR. SENSING: No, nothing at this point unless  
25 Mr. Getty wants to weigh in.

1 THE COURT: Mr. Getty?

2 MR. GETTY: I would just concur with what  
3 Mr. Sensing said. I think this puts us at a disadvantage.  
4 We thought we had an agreement and we've relied on that.

5 I was very surprised at the turnaround so late  
6 this morning, and I think if we have an agreement, it's  
7 essentially in the form of a stipulation, we ought to stick  
8 with it. I think that way nobody is prejudiced, we have  
9 limited discovery, we come back, and it's an even playing  
10 field.

11 The only other thing I will say is, I may  
12 have misunderstood something, but I distinctively recall  
13 discussing what witnesses, you know, were not going to  
14 testify or what witnesses might come back as a rebuttal. I  
15 never understood that **SGS was a potential rebuttal witness**.  
16 In fact, my specific recollection is that Mr. Lucas told me  
17 the only rebuttal witness he had was potentially **Mr. Payne**,  
18 who he would call on direct and then after our expert would  
19 testify, **Mr. Wolf**, that he would recall potentially **Mr.**  
20 **Payne** as a rebuttal witness. I do not recall any reference  
21 or discussion to, any discussion about anybody other than  
22 **Mr. Payne** being a rebuttal witness. I will take -- I will  
23 take the blame for misunderstanding, but that is my  
24 recollection.

25 THE COURT: All right. Thank you.

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1 Mr. Lucas?

2 MR. LUCAS: Yes. If I may, Your Honor, two  
3 points.

4 Mr. Getty is just incorrect in his last, in his  
5 last recollection, because we actually spoke. He raised  
6 by name people from **SGS** about whether or not they might be  
7 called and whether we might call them. I was telling him  
8 I did not intend to call them in our direct case, but they  
9 may be on rebuttal. I'm assuming that's just a faulty  
10 recollection on his part.

11 But the other point I just want to, just want  
12 to emphasize. You know, Your Honor mentioned yesterday some  
13 of the potential problems or issues that might arise with  
14 discovery and how it might expand beyond what was intended  
15 and things along those lines. My only point, just to make  
16 in a short comment, is we're not asking you to make a ruling  
17 on discovery. You could still decide. The motion is held  
18 in abeyance is what our proposal is. You could still decide  
19 whether or not there should be discovery.

20 As you saw from the proposal last night, the  
21 parties are talking about discovery. We couldn't reach a  
22 quick agreement as to what the appropriate scope of  
23 discovery would be, and so, I mean, it's not a question of  
24 discovery, not of discovery, even under the letter proposal  
25 of last evening.



1 As was indicated there, the whole scope of  
2 discovery, it has been talked about, it has not yet  
3 been decided, and it may be that the parties can reach  
4 agreement if discovery is to go forward or it may be that  
5 they can't and have to come to the Court to resolve their  
6 differences.

7 THE COURT: But your position is that there  
8 should be some discovery. Right, Mr. Lucas?

9 MR. LUCAS: No, Your Honor. I mean, I think  
10 this is over. I mean, I have a fundamental difference of  
11 opinion with defense counsel here. I will just be blunt.  
12 I mean, I think this is an effort just to take discovery  
13 after the discovery time period that they could have taken  
14 before.

15 This idea that they didn't have this letter is  
16 true, presumably, right, but the idea that they didn't, that  
17 they didn't challenge the results of various test results in  
18 this case were not accurate. Now, whether they thought they  
19 were falsified or not accurate, but these issues are issues  
20 they certainly could have raised in discovery in this case.  
21 I mean, they made a comment yesterday that, you know, about  
22 not having access to these things. I mean, they, as I  
23 recall, certainly, they could subpoena non-parties, and  
24 they received documents from non-parties such as Norfolk  
25 Southern. I believe they received, I could be wrong on

1 is. We want five days to make either a joint discovery plan  
2 or each party's proposal, and then plaintiff, with great  
3 reluctance, join in defendant's request.

4 Clearly, I guess now it's clear, this is a  
5 misunderstanding. You are preserving at least the option to  
6 argue ultimately that discovery should not be reopened.

7 MR. LUCAS: Or the extent to which discovery.  
8 Even the letter last night raises that the parties can't --  
9 even if there is discovery, Your Honor, if the parties can't  
10 agree as to the extent of discovery, that Your Honor would  
11 have to make that determination. I mean, and, again, I can  
12 understand your reading. I'm sitting here and listening to  
13 you and I can understand your reading of the letter.

14 THE COURT: You alluded to, you know, that I  
15 threw out the option, which is, one, frankly, I'm still  
16 considering, that this letter, you know, didn't come in,  
17 or, more precisely, it came in at a time that was just too  
18 late. Things happen, you know, on the eve of trial or  
19 during trial all the time that that, you know, don't become  
20 part of the trial. You know, we had a record and the case  
21 is being tried on that record.

22 I would have thought last night was the time to  
23 at least make clear you were reserving the right to push  
24 me for that position or, better yet, if that was your view,  
25 to say, you know, our position after careful thought,

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1 this, but I believed they received documents from SGS. I  
2 may be wrong, but they conducted discovery and third-party  
3 discovery. They just didn't pursue these matters.

4 So, no. I think discovery is over. I  
5 understand their argument, but I think in the reality of  
6 things, I think discovery is over, and one of the efforts  
7 here is just simply to extend discovery after the otherwise  
8 due date to get things, to inquire into subject matters  
9 that they could have inquired during the course of, during  
10 the course of the prior discovery.

11 THE COURT: Mr. Lucas, I always appreciate when  
12 parties work things out. I still have the discretion to  
13 accept or not accept their agreement. But I have to say I  
14 see nothing in the letter last night and heard nothing even  
15 in your presentation this morning to indicate anything other  
16 than that plaintiffs have already agreed that there should  
17 be some discovery and that there's just a dispute as to when  
18 it takes place and its scope.

19 Now, again, I have discretion to say, you know,  
20 I'm not persuaded that I should reopen discovery by the  
21 joint request, but the letter sets out, at least as I've  
22 read it, I think a reasonable reading, defendants feel  
23 compelled to request a short adjournment. Under this  
24 proposal, each side would be permitted to take limited  
25 discovery. We're still talking about what that discovery

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1 recognizing we only had half a day to think about it, but  
2 our position is this letter should be excluded and we should  
3 go forward. There is no good cause for discovery. Let's  
4 have this trial.

5 You didn't say that last night, you didn't even  
6 say it this morning, but only now, I understand you're, I  
7 guess, reserving the right to ultimately take that position.

8 MR. LUCAS: Well, I think -- again, I'm not  
9 trying to play games.

10 I think the Court has the ultimate discretion  
11 on that, and we don't dispute that. And then if the Court  
12 decides it's appropriate, the Court would decide it's  
13 appropriate and decide the extent to which.

14 Could the letter have been done better, Your  
15 Honor, with more time? I, I take responsibility for that.  
16 The letter itself was put together, probably I think  
17 Mr. Sensing would agree, maybe in the last 45 minutes before  
18 it was being filed and trying to get something to you in  
19 a timely manner. And that's really all I can say, Your  
20 Honor.

21 I'm not -- you know, could we have done better?  
22 Yes.

23 Did we do the best that we thought we could  
24 under the circumstances to get this information in to you  
25 by 9:00 o'clock? I will tell you we did the best that we



1 thought we could do at the time.

2 And I'm sorry, I wasn't more careful in that,  
3 but what can I say now.

4 THE COURT: At this point, though, you are  
5 not requesting to go forward with this trial if I'm going  
6 to allow the letter to be used even with Mr. Thrasher;  
7 correct?

8 MR. LUCAS: That's the clarification, Your  
9 Honor, that I told you I would need to get with Mr.  
10 Thrasher. That's the one point that you raised today that  
11 I indicated that is something I would have to clarify.

12 THE COURT: But you certainly are clear on  
13 you're not prepared to call your nonparty witnesses,  
14 certainly if the letter can be used. Let's start there.  
15 Right? I understand that.

16 MR. LUCAS: Yes, Your Honor. That's correct.

17 THE COURT: How about if I were to rule the  
18 letter is out? Are you ready to go forward with the  
19 nonparty witnesses?

20 MR. LUCAS: No, Your Honor. That is better in  
21 terms of getting away from the issues, but these issues are  
22 so -- I mean, the subject matter in the letter are so, you  
23 know, intertwined that I still think the same considerations  
24 with respect to the obligations and what's fair to these  
25 nonparty witnesses would remain.

1 with our proposal to adjourn in connection, you know,  
2 justifying this additional discovery.

3 But if Your Honor thinks that would be helpful,  
4 that is certainly something we could do.

5 THE COURT: Okay. Thank you.

6 I'm going to need to take a recess and give a  
7 little bit of thought to what you have proposed.

8 Let's reconvene at 10:30. So about 40 minutes  
9 from now.

10 Well, let's go back into public court, and I  
11 will say that to everyone.

12 So, Marco, if you can take us back, that would  
13 be great.

14 MR. HEIM: Absolutely. As before, at the bottom  
15 right you will see the leave room button, you can click on  
16 that. I'll initiate the breakout.

17 THE COURT: Thank you.

18 (Virtual sidebar conference ends.)

19  
20 I hereby certify the foregoing is a true and accurate  
21 transcript from my stenographic notes in the proceeding.

22

23 /s/ Brian P. Gaffigan  
24 Official Court Reporter  
25 U.S. District Court

1 So you're absolutely right with respect to I  
2 would not be comfortable under either circumstance to go  
3 forward at this time with nonparty witnesses testifying.

4 THE COURT: All right.

5 Mr. Sensing, anything you want to add?

6 MR. SENSING: No, Your Honor. Except, you  
7 know, again, we had an agreement, you know, when we were  
8 discussing these issues on the phone last night. It was not  
9 a situation of we're not -- we're reserving the right not to  
10 agree to any discovery at all. It was, hey, we're going to  
11 talk with the parameters. We're going to talk about whether  
12 it's third party, whether it's party, we'll fight about that  
13 another day.

14 But, again, I think this sort of multi-phased  
15 situation that Mr. Lucas is proposing is prejudicial to my  
16 clients. As I say, at the end of the day, we are going to  
17 want to use that letter, use the discovery related to that  
18 letter in our cross-examination of Mr. Thrasher. And, Your  
19 Honor, you know, we are certainly willing, and if Your Honor  
20 would want that, we could certainly do -- we could certainly  
21 make a supplemental filing on this issue. I mean, obviously  
22 this is something that sort of exploded in front of  
23 everybody yesterday morning.

24 If Your Honor thinks it would be helpful, we  
25 would be happy to make a supplemental filing in connection